CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

MICHELE A JONES

Claimant

ST JOSEPH HOSPITAL
c/o CAHHS

Employer-Appellant

Precedent Benefit Decision No.: P-B-494

OA Decision No.: 1516499
EDD: 0410 BYB: 01/02/2005

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ANN M. RICHARDSON

VIRGINIA STROM-MARTIN

JACK D. COX

DON L. NOVEY

TERRI M. CARBAUGH

Adopted as Precedent: November 14, 2006

Case No.: **AO-114002**
Claimant: **MICHELE A JONES**

The employer appealed from the decision of the administrative law judge which held that the claimant was not ineligible for unemployment insurance benefits beginning January 2, 2005, under section 1253(c) of the Unemployment Insurance Code based on the claimant's ability to work.[1]

ISSUE STATEMENT

The issue in this case is whether the administrative law judge had jurisdiction to consider the claimant's eligibility for unemployment benefits pursuant to section 1253(c) on the basis she was allegedly unavailable for work when the notice of determination issued by the Employment Development Department (Department) held the claimant ineligible under section 1253(c) on the basis she was unable to work.

STATEMENT OF FACTS

The claimant was employed as an assistant manager in the employer's business office. Her last day of work was June 14, 2004. On the next day, she began a leave of absence for health reasons. On September 13, 2004, the employer informed the claimant it was filling her position due to the employer's workload demands.

The claimant's physician released her to work as of January 3, 2005, but advised her not to work as an assistant manager. The claimant filed a claim for unemployment insurance benefits, which was made effective January 2, 2005.

The Department issued a notice of determination on January 26, 2005, holding the claimant ineligible for benefits under section 1253(c) beginning January 2, 2005, on the basis she was unable to work due to health reasons. The notice also advised the claimant that an individual is eligible for benefits in a week only if the Department finds that individual is able to work and available for work. The Department did not consider the question of whether the claimant was available for work under section 1253(c).

---

[1] All section references are to the Unemployment Insurance Code unless otherwise specified.

The claimant filed a timely appeal to the Department's determination. The notice of hearing listed the issue to be heard as whether the claimant was able to work and available for work under section 1253(c).

The claimant and the employer appeared at the hearing. The employer did not present evidence that the claimant was unable to work as of January 2, 2005 but instead presented evidence that soon after the claimant's release to work, it attempted to help her find another position in its organization. The employer and the claimant had contact between January 3, 2005 and January 12, 2005 concerning possible employment. However, according to the employer, as of January 13, 2005, and for a period of approximately six weeks thereafter, the claimant had no contact with the employer despite its calls to the claimant. The employer contended the claimant was not available for work during this six-week period and therefore was ineligible under section 1253(c).

The administrative law judge took the position that she only had jurisdiction to consider the issue of the claimant's ability to work as this was the basis for the Department's finding of ineligibility under section 1253(c). The administrative law judge informed the employer it could request the Department to issue a separate determination of the claimant's eligibility concerning her availability for work. The administrative law judge's decision held the claimant was not ineligible for benefits under section 1253(c) beginning January 2, 2005, because she was able to work. The decision did not address whether she was available for work. The employer appealed.

REASONS FOR DECISION

Section 1253(c) provides that a claimant is eligible to receive unemployment insurance benefits with respect to any week only if the claimant was able to work and available for work for that week.

The employer does not dispute the administrative law judge's decision concerning the claimant's ability to work. Instead, it contends the administrative law judge erred when she refused to assert jurisdiction under section 1253(c) to consider whether the claimant was available for work. We agree with the employer's contention on this point and remand the matter for further consideration.

To assert jurisdiction, there must be (1) "subject matter" jurisdiction, which is the authority or competency of a body to adjudicate the type of action

before it; and (2) "notice" jurisdiction, which encompasses the due process right of a party to adequate notice so that the party can exercise the right to be heard. (2 Witkin, California Procedure (4th edition 1996), Jurisdiction, § 6, p. 551-552.)[2]

I. Subject Matter Jurisdiction

We address first whether there is subject matter jurisdiction in the instant case for the administrative law judge to consider the claimant's eligibility under section 1253(c) on the basis she was allegedly unavailable for work.

Section 1334 provides in relevant part that, in unemployment insurance benefits cases[3], an administrative law judge shall affirm, reverse, modify, or set aside an appealed determination issued by the Department.

California Code of Regulations, title 22, section 5062(b) provides in relevant part:

> An administrative law judge shall consider only those issues in a department action which are appealed...or noticed by the agency. A related issue shall not be considered unless a waiver is obtained from all parties....

California Code of Regulations, title 22, section 5056(a) requires that notice of the issues be served at least 10 days before the date of the hearing.

Under section 1334 the administrative law judge's subject matter jurisdiction, i.e. authority to review and decide issues in unemployment hearings, arises out of appeals from a Department action. This action is usually in the form of a notice of determination. California Code of Regulations, title 22, section 5062(b) reiterates this same point but clarifies two important matters:

---

[2] Jurisdiction also includes "territorial" jurisdiction, i.e. the connection between a court's geographical boundaries and a person, thing or status in order for the court reasonably to exercise jurisdiction. (2 Witkin, Cal. Procedure, *supra*, § 6, p. 551.) The existence of territorial jurisdiction is not at issue in this case.

[3] The instant case involves a hearing on unemployment benefits. The discussion of time limits and procedures pertaining to unemployment hearings in this decision is not intended to restrict the applicability of this decision only to unemployment hearings.

(1) an administrative law judge shall consider an issue in a Department's determination if it is appealed or noticed. This means that the issue may be contained in the Department's determination and appealed, or the issue may arise out of the appeal process such as a late appeal under section 1328 to the Department's determination. In these situations, there is subject matter jurisdiction if the issue is properly noticed pursuant to California Code of Regulations, title 22, section 5056(a); and,

(2) an administrative law judge can consider an issue not previously noticed if it is related to an issue over which the administrative law judge has subject matter jurisdiction and the parties waive notice of the related issue.

Courts in other states addressing questions of jurisdiction in unemployment proceedings typically frame the issues to be heard and decided as those involving eligibility requirements in the benefit determination. (*Lewis v. Hot Shoppes* (Fla. Ct. App. 1968) 211 So. 2d 20; *White v. Idaho Forest Industries* (Idaho 1977) 98 Idaho 784 [572 P. 2d 887]; *Kaufman v. Department of Employment Security* (Vt. 1978) 136 Vt. 72 [385 A. 2d 1080]; *Fournier v. The State of New Hampshire* (N.H. 1981) 121 N.H. 283. [428 A. 2d 1238].)

Section 1253(c) requires a claimant to be both able to work and available for work in order to be eligible for benefits in a particular week. In the instant case, the Department held the claimant ineligible for benefits under section 1253(c) and advised her that to be eligible, she had to satisfy both requirements. By doing so, the Department put at issue the subject matter of whether the claimant met the eligibility requirements under section 1253(c). The notice of hearing similarly framed the issue to be heard as whether the claimant was able to work and available for work under section 1253(c).

Accordingly, the administrative law judge had subject matter jurisdiction over the issues of both the claimant's ability to work and her availability for work beginning January 2, 2005.[4] It was error for the administrative law judge to decide she did not have subject matter

[4] The availability issue was not a "related" issue because it was already included as part of the administrative law judge's subject matter jurisdiction.

jurisdiction over the availability issue, or that it could be addressed only by referring the matter to the Department.[5]

II. Notice Jurisdiction

In addition to subject matter jurisdiction, the administrative law judge must also have "notice" jurisdiction. (2 Witkin, Cal. Procedure, *supra*, §6, pp. 551-552.)

A. The Interests and Rights of The Parties To Notice

1. Claimant

Unemployment benefits provide a substitute for wages lost during a period of unemployment not the fault of the employee. (*California Department of Human Resources Development v. Java (Java)* (1971) 402 U.S. 121, 130.) Such benefits cannot be taken away without constitutional due process protections. (*Camacho v. Bowling* (N.D. Ill. 1983) 562 F. Supp. 1012, 1020; *Pregent v. New Hampshire Department of Employment Security* (D.N.H. 1973) 361 F. Supp. 782, 789, fn 9, judgment vacated and remanded for question of mootness, (1974) 417 U.S. 903.)

"The Fourteenth Amendment to the United States Constitution guarantees that no State shall 'deprive any person of life, liberty, or property without due process of law.' [fn omitted]. The cornerstones of due process, in its procedural sense, are notice and opportunity for fair hearing. [citations]" (*Camacho v. Bowling*, *supra*, 562 F. Supp. at pp. 1019-1020.)

Due process of law requires that an individual being denied benefits be given the opportunity to be heard at a meaningful time and in a meaningful manner. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267.) "The right to a hearing embraces not only the right to present evidence but also a reasonable

---

[5] By finding there is subject matter jurisdiction, we do not suggest an administrative law judge must always exercise such jurisdiction when it is available. There may be circumstances under which an administrative law judge may decline to exercise available subject matter jurisdiction and refer the matter to the Department, such as situations involving complex facts that require further investigation or calculation.

opportunity to know the claims of the opposing party and to meet them." (*Morgan v. U.S.* (1938) 304 U.S. 1, 18.)

The requirement of notice has been deemed to be part of the right to a fair hearing required by the Social Security Act (42 U.S.C. § 503(a)(3)). (*Camacho v. Bowling, supra*, 562 F. Supp. at p. 1020.) In unemployment cases, section 1334 provides that the administrative law judge shall afford the parties an opportunity for a fair hearing. "Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process. [citations]" (*Camacho v. Bowling, supra*, 562 F. Supp. at p. 1020.)

Applying the requirements of due process and a fair hearing, courts have concluded that in unemployment benefit hearings, the claimant is entitled to adequate notice of the legal and factual issues involved. (*Camacho v. Bowling, supra*, 562 F. Supp. at p. 1020 (due process and fair hearing); *Shaw v. Valdez* (10th Cir. 1987) 819 F. 2d 965, 968-970 (fair hearing); *Pregent v. New Hampshire Department of Employment Security, supra*, 361 F. Supp. at pp. 796-797 (due process).)

2. Employer and Department

Because unemployment benefits are funded by employer contributions (§ 976 et seq., §1025 et seq.), an employer has an interest in minimizing the benefits charged to its reserve account. (*Ohio Bureau of Employment Services v. Hodory (Hodory)* (1977) 431 U.S. 471, 490-491; *Java, supra,* 402 U.S. at p. 134.) An interested employer may furnish timely information regarding a claimant's eligibility (§1327, §1030) and receive notice of the Department's determination and/or a ruling. The employer may appeal an adverse Department decision. (§1328.)

The Department has an interest in preserving the fiscal integrity of the state unemployment fund by ensuring only eligible claimants are paid benefits. (*Hodory, supra*, 431 U.S. at p. 493; *Matthews v. Eldridge* (1976) 424 U.S. 319, 348.) The Department is an interested party to any appeal to its determination. (§1328.)

Both the employer and the Department have a right to participate in a fair hearing and to appeal an adverse decision of an administrative law judge. (§§1334, 1336.)

Various regulations provide the employer and the Department with specific rights to protect their respective interests in unemployment hearings. (California Code of Regulations, title 22, section 5056(a) (right to 10 days notice of the issues in a hearing); California Code of Regulations, title 22, section 5062(d) (e.g., right to review the case file, to call and examine witnesses, to introduce exhibits, and to rebut evidence); California Code of Regulations, title 22, section 5058 (right to subpoena witnesses and documents).)

The rights under the statutory and regulatory scheme are designed to allow the employer and the Department to take an active role in the administrative process, including the evidentiary hearing, concerning a claimant's eligibility. The employer and the Department can exercise their rights in a meaningful manner only if they know the claims of the other parties and have an opportunity to prepare to meet them. The employer and the Department are entitled to have adequate notice of the legal and factual issues involved in an evidentiary hearing.

B. Requirements for Adequate Notice of Factual Issues

In order for the administrative law judge to have notice jurisdiction, the parties must have both notice of the legal issues and notice of the factual issues. Notice of the legal issues is also part of the determination of whether the administrative law judge has subject matter jurisdiction. As found above, the parties in the instant case had proper notice of the legal issues. Accordingly, only the question of notice of the factual issues is discussed in the remainder of this decision.

Notice which contains only ultimate, legal conclusions, is inadequate. (*Dilda v. Quern* (7th Cir. 1980) 612 F. 2d 1055, 1057.) Notice that is too broad or generic and makes it impossible for a party to prepare for factual issues is insufficient. (*Shaw v. Valdez*, *supra*, 819 F. 2d at p. 969.)

Notice of the factual issues, however, does not require specific pleading of detailed facts, witnesses, or evidence that will be presented in a hearing. Notice of the nature of the facts underlying an agency's action is sufficient. (*Camacho v. Bowling*, *supra*, 562 F. Supp. at p. 1020.) Adequate notice requires that the person being given notice should be apprised clearly of the character of the action proposed and enough of the basis upon which it rests to enable him or her intelligently to prepare for the hearing. (*Cassidy v. Baltimore County Board of Appeals* (Md. 1958) 218 Md. 418, 424 [146 A. 2d 896, 899], citing 2 Merrill, *Notice*, Sec. 796.)[6]

Adequate notice of the factual issues should ideally be contained in the Department's determination or in the notice of hearing, or both. However, it is possible the Department's determination may be based on a misunderstanding of facts or lack of complete information. In these situations, adequate notice of the factual issues may still exist if a party is aware of the factual issues through other means prior to the date of the hearing and in sufficient time to prepare for the hearing. (*Shaw v. Valdez*, *supra*, 819 F. 2d at pp. 969-970 [providing advance copy of employer's protest letter]; *Gray Panthers v. Schweiker* (D.D.C. 1980) 652 F. 2d 146, 169 [providing advance access to file].)[7]

When faced with new factual issues, the administrative law judge should ascertain if the parties have adequate notice of the factual issues. For example, if the employer raised factual issues in its appeal letter and the claimant is served a copy as required by California Code of Regulations, title 22, section 5008(e), the claimant should have adequate notice of those factual issues.

---

[6] Various cases illustrate the inadequacy of notice for a particular factual issue to support a disqualification based on another factual issue. *(Pregent v. New Hampshire Department of Employment Security, supra*, 361 F. Supp. at pp. 795-977 [refusal to apply for position versus limited work opportunities due to retirement policies]; *Shaw v. Valdez, supra*, 819 F. 2d at pp. 969-970 [slow work performance versus causing dissension, incomplete paperwork and improper work]; *Reed v. Unemployment Appeals Commission* (Fla. Ct. App. 2003) 863 So. 2d 402, 403 [refusal of offer of work on specific date versus refusal of offer on a different date].)

[7] In this regard, we note that providing a party access to the file immediately prior to the hearing is not, by itself, adequate notice of the factual issues because in most instances, it will not allow a party who did not have notice of the factual issues beforehand sufficient time to prepare to meet those issues at the hearing. In the absence of an informed waiver of the right to notice, we deem a sufficient time period for preparation to be the minimum 10 days notice of the issues required in California Code of Regulations, title 22, section 5056(a).

(*Shaw v. Valdez, supra,* 819 F. 2d at pp. 969-970.) Similarly, if the claimant was advised by the employer of the factual issues at the time of separation or by the Department during the investigation of the claim, the claimant should have adequate notice.[8]

The administrative law judge must examine all relevant facts to ascertain if adequate notice was given to each party. However, we caution that doubts regarding whether a party has received adequate notice of the factual issues should be resolved in favor of the party entitled to notice.

C. Remedy for Lack of Adequate Notice of Factual Issues

1. General Factors

If adequate notice of the factual issues has not been provided, a continuance may be necessary to provide proper notice. (*Fournier v. The State of New Hampshire, supra*, 121 N. H. at p. 286; California Code of Regulations, title 22, section 5057(a) [administrative law judge may continue a hearing upon a showing of good cause].) "Due process of law requires either proper notice of the issues to be heard or a basis in the record to show an informed and intelligent waiver of the same." *(Lewis v. Hot Shoppes, supra*, 211 So. 2d at p. 21.)

California Code of Regulations, title 22, section 5000(fff) defines a waiver as "...the intentional relinquishment of a known right."

Due process is a flexible concept tied to time, place and circumstances and requires weighing of the governmental and the private interests affected. (*Matthews v. Eldridge, supra*, 424 U.S. at p. 334.) Specifically, the U.S. Supreme Court has articulated three distinct factors to be considered in evaluating whether the administrative procedures are constitutionally protected:

---

[8] The determination of whether notice of the factual issues exists is different from the determination of whether notice of the legal issues exists. For example, if the parties are aware a separation occurred as a result of a dispute between the claimant and a supervisor, the parties will have adequate notice of the factual issues even if the Department's notice of determination incorrectly identifies the legal issue (discharge versus voluntary leaving) involved in the separation.

a. the private interest affected by the official action;

b. the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and

c. the government's interests, including the function involved, and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. (*Id.* at p. 334-335.)

The adequacy of an administrative procedure in protecting the rights of the parties is evaluated by the totality of the procedure, not by analyzing components independently of each other. (*Gray Panthers v. Schweiker*, supra, 652 F. 2d at pp. 165-166; *Wilkinson v. Abrams* (3rd Cir. 1980) 627 F. 2d 650, 667.)

42 U.S.C. section 503(a)(1) requires that states receiving federal funds for the administration of unemployment benefits must pay benefits promptly "when due." "Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations." (*Fusari v. Steinberg* (1975) 419 U.S. 379, 389.) The requirement of timeliness is applicable in all phases of the administrative process, including the rapidity with which appeals of ineligibility are processed. (*Wilkinson v. Abrams, supra,* 627 F. 2d at pp. 660-661.)

The requirements of prompt payment of benefits and a fair hearing merge to achieve two important goals, namely the prompt payment of benefits to eligible claimants and the preservation of scarce funds by preventing the payment of benefits to ineligible claimants. (*Jenkins v. Bowling* (7th Cir. 1982) 691 F. 2d 1225, 1230.) A government's interest in enforcing its valid eligibility criteria and minimizing its administrative expenses may be grounds for postponing the prompt payment of benefits as long as the length of the postponement is not unreasonable. (*Id.* at p. 1229.)

California Code of Regulations, title 22, section 5068(a) provides in relevant part that when a party fails to appear in

any day of a hearing and an administrative law judge's decision is adverse to that party's interest, the party may apply to vacate the decision within 20 days. The application to vacate may be granted upon a showing of good cause. (California Code of Regulations, title 22, section 5068(d).)

2. Claimant

Applying the factors cited in *Mathews v. Eldridge, supra,* the claimant's interest in unemployment benefits is constitutionally and statutorily protected and cannot be taken away without adequate notice of the legal and factual issues involved. When adequate notice of the factual issues is lacking, the risk of deprivation of the claimant's right to unemployment benefits is high as the claimant may be unprepared to present relevant evidence concerning his or her eligibility. Without adequate notice, a hearing serves no useful purpose. (*Crosby v. Ward* (7th Cir. 1988) 843 F. 2d 967, 982-983, citing *Gray Panthers v. Schweiker, supra,* 652 F. 2d at p. 168.) A continuance to allow an opportunity to prepare is a reasonable safeguard to protect the claimant's rights in these circumstances. (*Lewis v. Hot Shoppes, supra*, 211 So. 2d at p. 21.)

The employer's interest is not prejudiced by a continuance in that its primary objective of relieving its reserve account is not time-sensitive and can be accomplished in a continued hearing. Similarly, the Department's interest in enforcing eligibility criteria can be accomplished in a continued hearing. The burden on the employer or the Department as a result of a continuance cannot be considered so great that it justifies depriving the claimant of his or her core due process rights. (*Crosby v. Ward, supra*, 843 F. 2d at p. 984.)

A party may appear in a hearing in person, by electronic means in an electronic hearing, by written statement or by interrogatories or deposition if ordered by the administrative law judge. (California Code of Regulations, title 22, section 5061.) California Code of Regulations, title 22, section 5000(cc) defines an "electronic hearing" as one in which a party or witness appears by telephone, television or other electronic means.

The analysis concerning the claimant's right to a continuance applies equally whether the claimant is absent or has appeared by written statement.[9] In these situations, without adequate notice, the claimant has not had the opportunity to make an informed decision whether to appear at the hearing to contest new factual issues. (*Dotson v. Duffy* (N.D. Ill. 1988) 732 F. Supp. 857, 872; *Schulte v. Transportation Unlimited, Inc* (Minn. 1984) 354 N. W. 2d 830, 833-835.)

We recognize that a claimant who has not appeared in a hearing and lacks adequate notice of the factual issues has the right to request to vacate an adverse administrative law judge's decision. However, we note this remedy is not available when the claimant has appeared in the hearing by written statement. Further, it does not cure the deprivation of the claimant's basic due process right to receive adequate notice before the hearing. (*Gray Panthers v. Schweiker, supra*, 652 F. 2d at p. 169 [lack of adequate notice not offset by a compensating procedure elsewhere in the process]; *Moore v. Ross* (S.N.Y. 1980) 502 F. Supp. 543, 553-554, aff'd (2nd Cir. 1982) 687 F. 2d 604, [availability of subsequent judicial review not a cure for lack of adequate notice].) A process is unfair which puts the burden on the claimant to insist on receiving notice he or she should have received in the first place. (*Ibid.*)

We conclude that where the claimant lacks adequate notice of the factual issues, the claimant must be offered a continuance and given adequate notice or the claimant must give an informed waiver before the hearing can proceed. (*Lewis v. Hot Shoppes, supra*, 211 So. 2d at p. 21.)

---

[9] An appearance by a party by way of interrogatories or deposition pursuant to California Code of Regulations, title 22, section 5061 is rare and is similar in effect to an appearance by written statement. Therefore, whenever reference in this decision is made to a party's appearance by written statement, it should be treated as including reference to a party's appearance by way of interrogatories or deposition.

3. Employer and Department

The employer and the Department are also entitled to know the legal and factual issues in order to exercise their rights in a hearing effectively. The interests of the claimant to prompt payment of unemployment benefits must be weighed against the interests of the employer and the Department. (*Jenkins v. Bowling, supra*, 691 F. 2d at p. 1229.) When the employer or the Department appears in person or by electronic means in a hearing, intending to exercise its rights, and such party does not have adequate notice of the factual issues, there is a reasonable basis to offer that party a continuance so that it may properly prepare. In such instances, the employer or Department may give an informed waiver of adequate notice.

When the employer or the Department does not appear in a hearing or appears by written statement, the reasons for the absence or the method of appearance are not necessarily known. Similarly, it may not be known whether that party had actual notice of new factual issues. The employer or the Department may intend not to pursue the administrative process further, including attending a continued hearing. Due to these uncertainties, a continuance for the sake of ensuring adequate notice of the factual issues to an employer or the Department in these circumstances may be unnecessary.

There are safeguards available to allow the hearing to proceed in these situations. If the administrative law judge issues an adverse decision on the merits, the employer or the Department who has not appeared in the hearing may request to vacate the decision and would have good cause if the decision is based on factual issues of which it did not have adequate notice and did not give an informed waiver. (California Code of Regulations, title 22, section 5068(a).)[10]

---

[10] If a party who did not appear at a hearing establishes good cause to vacate an administrative law judge's decision based on the lack of adequate notice of the factual issues, the administrative law judge has authority pursuant to California Code of Regulations, title 22, section 5062(f) to exclude evidence related to factual issues of which there was adequate notice unless that party demonstrates good cause for the nonappearance independent of the lack of adequate notice. It would constitute an injustice for a party to be able to introduce evidence in a reopened hearing on factual issues of which it did have adequate notice but did not have good cause for the nonappearance at a prior hearing.

While this safeguard is inadequate for the claimant for reasons stated above, the rights of the employer and the Department are not prejudiced by the request to vacate process because their interests are not as time-sensitive as the claimant's interests and can be protected in a reopened hearing. This safeguard ensures the overall fairness of the appellate process in protecting the claimant's right to due process and a prompt resolution while at the same time providing the employer and the Department who did not appear with an opportunity to correct any errors before the administrative law judge's decision becomes final.

With respect to an employer or the Department who appeared by written statement and who did not receive adequate notice of the factual issues or give an informed waiver, such party has a right to appeal the administrative law judge's decision pursuant to section 1336. Assuming there are no other factors involved such as an untimely appeal, this party would be entitled to have the administrative law judge's decision set aside by the Appeals Board and have the matter remanded based upon the lack of adequate notice of the factual issues and the lack of an informed waiver. This provides an opportunity in the appellate process for such party to raise the issue of lack of adequate notice before the administrative law judge's decision becomes final.

Therefore, where the administrative law judge finds the claimant and any other party who appears in person or by electronic means in the hearing has received adequate notice of the factual issues, or has waived the right to such notice, the administrative law judge may proceed with the hearing. The administrative law judge may do so without providing notice of new factual issues to an employer or the Department who has not appeared or has appeared by written statement and without obtaining a waiver from them. This employer and the Department have the rights stated above to protect their interests.

4. Summary of Remedy for Inadequate Notice

If a question exists about whether there is adequate notice of the factual issues, the administrative law judge must

ascertain if all the parties have adequate notice. If all parties have adequate notice of the factual issues, and assuming notice of the legal issues exists, the administrative law judge has notice jurisdiction and can proceed with the hearing.

If adequate notice of the factual issues is lacking, the administrative law judge must:

a. Continue the hearing to provide adequate notice if:

   (1) the claimant has not appeared or has appeared by written statement,

   (2) the claimant does not have adequate notice, and,

   (3) the claimant has not given an informed waiver; or

b. Take the following steps if the claimant appears in person or by electronic means:

   (1) notify any party who does not have adequate notice and appears in person or by electronic means of the right to such notice; offer that party a continuance to prepare; and

   (2) either:

      (a) continue the hearing if requested by that party or if that party does not give an informed waiver, or

      (b) obtain an informed waiver from each party who lacked adequate notice and appears in person or by electronic means, note this as part of the record and proceed with the hearing.

D. Application of Law Regarding Adequate Notice

In the instant case, the Department's determination notified the claimant she was ineligible for benefits because she was unable to work due to health reasons. She was also advised she would continue to be ineligible until the disqualifying conditions no longer existed. The notice of hearing, combined with the notice

of determination, was sufficient notice to apprise the claimant of the legal issue and the factual claims regarding her health and ability to work as of January 2, 2005, and afforded her the opportunity to gather available evidence, such as relevant medical reports, to meet these particular claims.

The notice of determination and the notice of hearing did not advise the claimant there was any factual issue involving the claimant's alleged lack of contact with the employer for the six-week period beginning January 13, 2005. There is no evidence the claimant was given notice by any other means that she needed to address this factual issue at the hearing.

The administrative law judge did not offer the claimant a continuance or obtain an informed waiver from her concerning the lack of adequate notice of the factual issues. If the administrative law judge had done so, she would have had notice jurisdiction to consider whether the claimant was unavailable for work due to her lack of contact with the employer for the period in question.

E. Conclusion

As the undisputed evidence establishes that the claimant was able to work, we affirm the administrative law judge's decision insofar as it finds the claimant is not ineligible for benefits under section 1253(c) beginning January 2, 2005, based on the claimant's ability to work.

We find that the administrative law judge had subject matter jurisdiction to consider the claimant's availability for work for the six-week period in question. However, the administrative law judge did not have notice jurisdiction involving the availability issue because she did not advise the claimant of her right to adequate notice of the new factual issue, did not offer her a continuance, or in the alternative, did not obtain an informed waiver of such notice from the claimant.

The administrative law judge mistakenly believed there was no basis upon which she could assert jurisdiction over the availability for work issue. However, since we find the administrative law judge could have obtained notice jurisdiction had she followed the procedures described above, we will

remand this issue for another hearing. By virtue of this decision, the parties will have received notice of the factual issue raised by the employer such that the administrative law judge will now have notice jurisdiction to consider the claimant's alleged unavailability for work.

The issue under code section 1253(c) involving the claimant's availability for work is remanded to an administrative law judge for a further hearing and decision. Pursuant to California Code of Regulations, title 22, section 1253-1, eligibility for benefits under section 1253(c) is determined on a weekly basis beginning the Sunday of each week. Therefore, the administrative law judge shall consider the claimant's availability for work under section 1253(c) beginning January 9, 2005 and continuing for six weeks thereafter.

DECISION

The decision of the administrative law judge is affirmed insofar as it finds the claimant is not ineligible for benefits under section 1253(c) beginning January 2, 2005, based on the claimant's ability to work. We remand to an administrative law judge the issue of the claimant's availability for work under section 1253(c) beginning January 9, 2005, and continuing for six weeks thereafter. The hearing transcript/audio recording, exhibits and other documents admitted so far in this proceeding shall remain a part of the record.